STATE OF MICHIGAN

COURT OF APPEALS

KEITH A. FANTOZZI,

Plaintiff-Appellant,

v

DEQUINDRE/HAMLIN DEVELOPMENT,

Defendant,

and

DUSTY & MOLLY ENTERPRISES, INC., d/b/a 7-ELEVEN STORE 33143,

Defendant-Appellee.

UNPUBLISHED
March 27, 2007

No. 273004
Macomb Circuit Court
LC No. 05-003130-NO

Before: Zahra, P.J. and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in plaintiff's premises liability action. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

On February 22, 2005, at approximately 4:40 a.m., plaintiff slipped and fell on "black ice" in the parking lot at defendant's 7-Eleven store and gas station. The weather was cold and it had snowed two days before, but plaintiff did not notice any snow or ice on the ground, other than snow that was pushed up against the edges of the gas pump island. Plaintiff testified that he was looking down before he fell, but he did not see the ice either before or after the fall. However, as he was lying on the ground after falling, he could tell from the coldness of the pavement that there was a large area of black ice.

Kenneth Rhodes, defendant's sole shareholder, testified that the temperature at the time of the incident was approximately 34 degrees Fahrenheit, with melting conditions. Rhodes had visually inspected the parking lot at 1:30 a.m. and again at 3:00 or 3:30 a.m. and observed that it was above freezing and that conditions were melting, with puddles. The sidewalks had been

salted, but Rhodes did not observe salt in the parking lot. Rhodes walked around the entire parking lot again a few hours after plaintiff's fall and observed puddles, but no ice.

Weather records from the National Oceanic Atmospheric Association (NOAA) indicated that a "notable storm" moved into the area on February 20, 2005, with snow continuing all day before changing into sleet and freezing rain in some areas by evening. The NOAA records also indicated that the area received 5.6 inches of snow on February 20; zero inches on February 21; and 0.7 inches on February 22, 2005. Defendant's parking lot had been plowed twice, and possibly salted, on February 20 by an independent contractor; the contractor had also salted the lot on February 21.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), holding that plaintiff had failed to proffer evidence establishing that defendant had actual or constructive knowledge of the alleged icy condition of the parking lot. This appeal followed.

II. Legal Analysis

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004); *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

A landowner has a duty to exercise reasonable care to protect an invitee from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, landowners "are not absolute insurers of the safety of their invitees." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). "'The invitor's legal duty is "to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land" that the landowner knows or should know the invitees will not discover, realize, or protect themselves against.'" *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002), quoting *Bertrand*, *supra* at 609 (citation omitted). This duty arises only when the danger is attributable to the invitor's negligence, or if the invitor had actual or constructive knowledge of its existence. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706-707, 644 NW2d 779 (2002). To charge the invitor with knowledge of the dangerous condition, it must have "'existed a sufficient length of time that [defendant] should have had knowledge of it.'" *Derbabian*, *supra* at 706, quoting *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999) (citation omitted).

The evidence demonstrates there had been a major snowstorm in the area two days before plaintiff's fall, but there had been no significant precipitation since. The parking lot had been plowed twice on the day of the snowstorm and had been salted the next day. The temperature

was approximately 34 degrees Fahrenheit on the morning of plaintiff's fall. Rhodes had inspected the parking lot on two occasions during the early morning hours on the day in question, the second time only an hour before plaintiff's fall. He noticed melting snow and puddles in the parking lot, and he did not see any ice. When Rhodes inspected the parking lot within hours after the accident, he again noticed puddles but no ice. At no time did anyone, including plaintiff and Rhodes, actually see the ice on which plaintiff fell. Under these circumstances, we hold that plaintiff failed to create a genuine issue of material fact as to whether defendant had notice of the icy condition sufficient to trigger any duty to mitigate the danger. See *Derbabian, supra*, 706-707 (where it had not snowed for several days, had only rained a few hours before reverting to freezing temperature, the ice patch on which the plaintiff fell was only the size of two parking spaces, and no other person, including plaintiff, had observed the ice before the fall, plaintiff failed to establish that the defendant knew or should have known of the icy condition of a parking lot or that the defendant's failure to salt the lot was unreasonable).

Plaintiff relies heavily on the affidavit submitted by his meteorology expert, Paul H. Gross, in which Gross stated that the ice on which plaintiff slipped had formed or reformed as a result of snow, sleet, and freezing rain that fell on February 20, 2005, and that an appropriate amount of salt applied to the parking lot would have prevented the formation of black ice. However, Gross's testimony is silent with respect to the relevant issue: whether defendant knew or should have known about the presence of ice in the parking lot at a time when the temperature was above freezing and there had been no precipitation for two days. Plaintiff further contends that, because Rhodes noticed that salt was present on the sidewalk outside the store, he should have known that ice was present in the parking lot. We agree with the trial court that the possible presence of ice on the sidewalk (thus explaining the application of salt by an employee of defendant) at some point prior to plaintiff's fall does not indicate that ice was present in the parking lot, particularly where the parking lot had been professionally salted the day before. Moreover, there is no evidence concerning when the salt had been placed on the sidewalk or whether ice was present on the sidewalk at that time.

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens